IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26..03..2007

Coram

The Honourable Mrs.Justice CHITRA VENKATARAMAN

C.M.A.No.1681 of 1999

The General Manager
Shipping Corporation of India Ltd.,
Jawahar Building
Chennai 1 Appellant

versus

A. Maria John Respondent

Civil Miscellaneous Appeal filed under section 30 of the Workmen Compensation Act against the order dated 28.4.1999 made in W.C.Case No.193 of 1997 on the file of the Commissioner of Workmen's Compensation, Chennai.

For Appellant : Mr.S.Silambannan
For Respondent : Mr.P.K.Gopalraj

JUDGMENT

This appeal is by the Shipping Corporation of India Limited, Chennai challenging the award passed by the Commissioner of Workmen's Compensation, Chennai. The question of law raised in the appeal is whether the provisions of Workmen's Compensation Act would apply in the case of the deceased, IV Engineer Officer, covered under the MUI-INSA agreement? Apart from that, the appellant had raised a further question as to, whether the injury or death caused due to wilful act can be said to be arising out of and in the course of employment? The appellant also questioned the authority of the Commissioner to decide on the question of compensation permissible under the Merchant Shipping Act, 1958?

2. One Sebastian Caesar was employed as a IV Engineer in the ship M.T.Sabarimala belonging to the appellant herein. The ship was berthed at Safi Port, Morocco. It is stated that on 28.7.1995, the deceased along with yet another II Engineer by name Narayana Prakash, went for a swim in the port water in their boiler suit. It is stated that the deceased was feared drowned at about 17.15 hours. The appellant herein had admitted the employment of the deceased. However, it resisted the application for compensation stating that the deceased did not fall under the definition of "workman" to be covered under the provisions of the Workmen's Compensation Act. The appellant also stated that the deceased was drawing a basic salary of Rs.6,030/-. Being an Officer, the claimant could not

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invoke the provisions of Workmen's Compensation Act for compensation.

3. Referring to the definition of "Workman" as well as the definition of "Seaman" under Section 2(k) of the Workmen's Compensation Act, the appellant contended that the deceased was not a master of the ship to fall under the provisions of the Workmen's Compensation Act. The appellant also referred to the agreement entered into between the Maritime Union of India and the Indian National Ship Owners' Association and submitted that the terms and conditions of employment are covered on the basis of the memorandum of agreement settled by the Negotiating Committee of Indian National Ship Owners' Association and MUI and Merchant Navy Officers. The said agreement refers to the compensation payable to the Officers and also refers to the remedy available. The appellant submitted that since the claimant had based his claim only as per Clause 147 of MUI-INSA agreement, the claimant should approach the Shipping Corporation of India and not before the Workmen's Compensation Act. Quite apart from this fact, the appellant also contended that the deceased acted wilfully in inviting this accident.

4. The appellant submitted that the death did not occur as a result of the accident arising out of and in the course of employment. Referring to the instruction given by the Shipping Corporation of India, the learned counsel submitted that swimming should not be permitted under certain conditions, that the permission should be obtained before the officer to go for a swim in the port, that the deceased herein violated the instructions displayed on the notice board on the vessel and had gone for swimming contrary to and in violation of the instructions without getting permission from the captain. The appellant further submitted that the father of the deceased filed a Habeas Corpus Petition before this Court in H.C.P.No. 1282/95, wherein, it was recorded that the death of the alleged detenu appeared to be natural. With the above-stated defence, the appellant prayed for dismissal of the claim petition.

5. By order dated 28th April 1999, the Commissioner of Workmen's Compensation, Chennai, passed an award fixing the compensation at Rs.6,63,300/-. Aggrieved of this, the Shipping Corporation is on appeal.

6. The learned counsel appearing for the appellant submitted that the claim of the respondent ought not to have been decided upon by the Commissioner under the Workmen's Compensation Act considering the fact that the deceased could not be brought under the definition of the provisions of the Workmen's Compensation Act. Reiterating the contention that the deceased was an Engineer Officer, the learned counsel submitted that the Commissioner erred in holding that the deceased fitted in with the definition of Section 2(k) and 2(1)(a) of the Workmen's Compensation Act. The learned counsel further submitted that when a specific remedy is available to the claimant before the Shipping Corporation of India, the respondent herein ought not have approached for a relief under the Workmen's Compensation Act. He laid particular emphasis to Clause 147 of MUI-INSA agreement and submitted that where the injuries caused or death

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caused on Officer was on the default or misbehaviour of the officer, no compensation would be payable under any of the provisions of the agreement. Consequently, he submitted that in any event, the respondent is not entitled to claim any compensation.

7. Referring to the facts of this case, the learned counsel submitted that the deceased violated the terms and conditions of service in going for swimming without obtaining permission from the captain. He further submitted that swimming in Morocco port was not permitted by the captain and that the accident had not occurred while he was on duty. Referring to the fact that the ship was berthed far away and not near the shore, the deceased had gone in his boiler suit knowing fully well that swimming in boiler suit in deep sea was dangerous; hence, unmindful of the consequences, the person had acted negligently. The appellant could not be mulcted with any liability.

8. Referring to the order of this Court in the H.C.P., the learned counsel for the appellant submitted that this Court had given a finding that the deceased had gone for swimming in a boiler suit. Attacking the finding of the Commissioner that the appellant had not produced the log book or examined eye witness Narayana Prakash, the other officer who went for a swim, the learned counsel submitted that the documentary evidence produced, including the enquiry report, was more than sufficient to prove the wilful act of the deceased. He further referred to Section 434-A and 101 and 101(2)(J) of the Merchant Shipping Act and submitted that when the Commissioner had held that the Merchant Shipping Act was applicable, he ought to have rejected the petition. Instead, relying on Section 17 of the Workmen's Compensation Act, he granted the relief. He also referred to Section 19(2) of the Workmen's Compensation Act which bars any civil remedy and stated that the Act itself was not applicable to the case. Assuming the Workmen's Compensation Act applied, the maximum limit of compensation that could be granted is only Rs.2 lakhs. In the circumstances, he prayed for setting aside the order of the Commissioner of Workmen's Compensation.

9. The learned counsel appearing for the respondent herein submitted that when the appellant herein had failed to discharge the onus on them that the accident was not arising out of or in the course of employment, the order of the Commissioner could not be disturbed. The learned counsel also pointed out that the appellant had not examined the eye-witness Narayana Prakash on the factum of swimming contrary to the orders or without obtaining the permission. He also referred that the body of the deceased was not traced even today. He submitted that the onus is on the employer to prove the facts since, in the peculiar circumstance, the claimant would not be aware of the circumstances under which the death occurred. The enquiry report dated 23.8.1995, marked as Ex.R12, showed that the same was conducted long after the accident, when the ship touched the Indian shore. The learned counsel for the respondent further submitted that the appellant had failed to discharge the onus on them, considering the fact that they had not marked the log book of the ship,

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attendance register, apart from not examining the eye-witness Narayana Prakash, which would help the claimant to cross-examine him to get the truth. Referring to the non-production of vital records, such as, log book, the respondent submitted that the presumption that the deceased died as a result of the accident arising out of or in the course of the employment has to be necessarily be drawn. Pointing out to the fact that the enquiry report marked as Ex.R12 did not concern the other witness, the learned counsel for the respondent questioned why no action was taken against the eye-witness who went along with the deceased in violation of provisions. Referring to Section 2K of the Workmen's Compensation Act, that "seaman" means any person forming part of the crew of any ship, but does not include the master of the ship, he submitted that Section 15 of the Workmen's Compensation Act was very much available for the purpose of deciding the compensation. He also submitted that the appellant had not produced the service agreement and the insurance policy of the deceased, as contemplated under Section 101 and 434A of the Merchant Shipping Act. The appellant is an undertaking of the Central Government, and was bound to act in accordance with law. Consequently, he stated that the appellant is bound to pay the compensation as per Clause 147.

10. Heard the learned counsel for the appellant as well as the respondent.

11. A perusal of the order of the Commissioner shows that on the question of maintainability of the application, he held that the deceased was a workman under the provisions of the Workmen's Compensation Act. He held that the deceased was not a Master of the ship, hence, the dependant was entitled to file a petition under Section 15 of the Workmen's Compensation Act. Referring to the agreement between Maritime Union of India and the Indian National Ship Owners' Association, the Commissioner held that the claim itself was based on the Clause 147, that Workmen's Compensation Act enacted by the Parliament has an universal application; therefore, any agreement whereby a workman relinquishes his right to claim compensation is null and void.

12. As to the accident that occurred, the Commissioner noted that the appellant had not produced the official log book of the ship nor examined the eye-witness. He also pointed out that from the report at page 5, there was no intimation from the local port or any statutory authority that swimming in that particular place was dangerous and that as a matter of fact, local people were reportedly using the tetrapods as diving boards and swim in the same area where the incident took place.

13. Referring to Ex.R12, the Commissioner held that the beach was over-crowded, that the II Engineer, at that time, on hearing the cries from the deceased, tried to swim back to help him but the deceased dragged down and by the time the II Engineer came back with local men and searched under water, but the deceased could not be traced. The Commissioner also referred to the fact that the II Engineer informed the Electrical officers that they were going for a swim. The Commissioner concluded that as per

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the report Ex.R12, the deceased did not act negligently and carelessly in going for a swim in the public beach. There was nothing in the report as to the act of the deceased or recommending any action against the II Engineer. Consequently, the Commissioner held that the appellant had failed to prove the contention that the deceased invited the accident by violating the instructions. The Commissioner further held that the employer could not refuse payment of compensation under Section 3 of the Workmen's Compensation Act. In the circumstances, there was no violation of the provisions of the Act and thus held that the appellant herein is responsible for payment of compensation.

14. Referring to the agreement, the Commissioner held that the payment of compensation is subject to the provisions of the Workmen's Compensation Act. Taking the basic wages of the deceased at Rs.6,030/-, the Commissioner worked out the compensation at Rs.6,63,300/-. The respondent had marked a condolence letter written by co-worker Ex.A5 dated 29.7.1995 as well as Ex.A2, which informed about the drowning of the deceased. A perusal of Ex.R12, which is an enquiry report, show that the enquiry was conducted on 21.8.1995 and 22.8.1995 after the ship arrived at Vishakapatnam on 20.8.1995. Investigation was conducted by an Officer in C.B.I., who was accompanied by the brother-in-law of the deceased. It is stated that the deceased was keeping watch at the sea between 8 hours to 12 hours. He was not called for standby duty on 28.7.2005 during the maneuvering of the vessel in the morning. After taking usual rounds, he started working as per the instructions of the II Engineer on decarbonisation of Main Engine Unit No.1. The work was finished before 5 O' clock in the evening. Thereafter, the deceased and the II Engineer met the Electrical Engineer and informed that they were going for a swim. It is stated that the Electrical Engineer refused to join them for a swim. It is also stated that both these Engineers left to their respective cabins to take off their shoes but retained their working boiler suit. It is also stated that the IV Engineer deceased decided to go for a swim directly from the vessel and swim to the break-water wall which was about 150 metres away from the midship of the vessel. A diagram showing the location of the vessel and the break water and beach was also marked. It is stated that both the officers jumped into the water from the bottom rung of the pilot ladder which was just forward of the midship cargo manifold on port side. Just after crossing the bow of the vessel, when the II Engineer turned for the shore, he heard muted cry from the IV Engineer. Since the II Engineer could not make the location of the IV Engineer, he shouted to the IV Engineer to keep afloat and came to the shore which was more or less equal distance from where the IV Engineer was stated to have been floating. Coming to the shore and climbing over the tetrapods he ran back to the ship and made a search. On information to the officials of the ship, a thorough search was made in the sea, but the deceased could not be located. The Master of the ship informed the agent, who in turn informed the Port authorities. The search continued till 19.30 hours. Under-water search was also carried out on 29th and 30th July 1995, but the deceased could not be found. After informing the Immigration authorities, police and Indian Embassy, which are enclosed in the statement of the Master and

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the related documents, an enquiry as stated above was recorded. It is also stated that in spite of the search continued with the help of Port authorities, the deceased could not be traced. The facts found in the report was that the relationship of the deceased with all the officials were cordial and friendly, that the officers went for a swim at about 17 hours. He also pointed out that there was no intimation from the local port or any statutory body that swimming in the port water was dangerous. Several local people were swimming in the same place where the incident took place. The result of the enquiry show that there was no foul play involved in the accident, that swimming at sea where the swell between 1/2 to 1 mtr with wind speed against at 25 knots and water temperature at 17 degree Celcious would be very tiring for a good strong swimmer. They further pointed out that although the deceased was a good swimmer, yet, he was confined to the small swimming pool on board and that too on a very few occasions. In the circumstances, they concluded that he might have developed extreme fatigue and cramps leading to drowning. They also stated that the body could not be found in spite of thorough search. The report concludes that Officers should not have gone for swimming with boiler suit on in the first place because boiler suits would not only soak water and make the body heavier but would also cause impediment to free movement of the limbs. They also pointed out that Officers and crew members on board did not seem to take the idea of safety measures very seriously. Thus the sum and substance of the report was that the deceased went for swimming after office hours and in a dress which was not conducive to free movement of limbs.

15. A perusal of the judgment of this Court passed in the H.C.P., which is marked as Ex.R1, shows that there were no witnesses to the entire events. Taking note of the overwhelming records available, this Court held that the death appeared to be a natural and hence, dismissed the H.C.P.

16. On an analysis of these documents marked on both sides, it is clear that the deceased had gone for swimming after work hours and in a suit which was not conducive for swimming. The person conversant about the rules and regulations and the difficulties of swimming in a boiler suit, failed to take normal precautions which is expected of him while swimming on the deep sea. It is no doubt true that the eye-witness was not examined in this case on the side of the appellant. Nevertheless, the report marked herein clearly show that enquiry was conducted in the presence of the relative of the deceased. The enquiry also show that the IV Engineer, deceased, along with the II Engineer went for a swim ignoring the standing instructions. Hence, even though, the eye-witness was not examined, yet, it cannot be controverted by the claimant that the accident did not occur while he was on duty. The respondent submitted that the appellants had personal knowledge about what had happened, but the proceedings or enquiry done by the legal authorities were not marked herein. It must be noted that the enquiry report speaks about the accident elicited from the co-engineer who swam along with the deceased. In the circumstances, going by the statement of facts in the report as well as the order of this Court in the H.C.P., it is clear that the accident had

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not occurred due to any one of the causes pertaining to the nature of employment to call it as one arising out of or in the course of employment.

17. The learned counsel for the respondent, however, submitted that the accident should be taken as a one arising in the course of employment. He submitted that since the same occurred on the foreign shores and the ship was berthed in Morocco, the accident should be viewed as one arising in the course of employment.

18. There is no denial of this fact that the accident occurred while he was under employment. Yet, the question is, was the accident linked to a fact arising out of employment, or in the course of employment. The accident occurred after the office hours which ended at 5.00 p.m. It is not contended by the claimant that the duty of the deceased was 24 hours on the ship. In these circumstances, in the absence of any material to show that the nature of employment require the deceased to be at the time on the ship, that even going off the shore from India should be taken as one in the course of employment, it is difficult to accept the plea of the respondent herein.

19. The learned counsel for the respondent vehemently argued on the question that the appellant have not discharged their onus that the accident has occurred in the course of employment. I do not agree with the contention of the learned counsel for the respondent. As already stated, it is an admitted fact that the death occurred on the foreign shores. At the same time, as I had stated already, merely because it occurred when the ship was berthed in a foreign soil, it could not be construed as one arising in the course of employment. The act of going for a swim after office hours, could not be extended even to an extended place of work. Act of swimming had nothing to do with the nature of the employment. Consequently, I reject the plea of the respondent herein. The fact finding authority referred to the report on its judgment; hence, it will clearly show that the accident is not one linked to the nature of the employment arising out of or in the course of employment. There is hardly any fact to link the deceased's employment which took him to the mid sea apart from the fact that there is nothing to show that the conduct of the deceased was incidental to his employment. It must also be noted that the burden of proof is heavily on the claimants and it must be discharged by the same means as should be in a case of an injured person being a claimant. The words 'in the course of employment' have been consistently interpreted by the Supreme Court in a number of decisions as to mean 'in the course of the work which the workman is employed to do and which is incidental to it. The words arising out of employment are understood to mean that during the course of employment injury has resulted from some risk incidental to the duties of the services which unless engaged in the duty owing to the master, it is reasonable to believe the workman would not have otherwise suffered.' The causal relationship between the accident and the employment, or as an incident of employment is a matter which must be proved by the claimants to sustain the claim for compensation. Even in

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matters like the one under consideration now before this Court, though it may not be possible to have a direct evidence, yet, the facts proved must justify an inference to point out the link between the employment and the accident. As already noted, the facts do not lend themselves to draw an inference in favour of the claimants herein. A decision coming to close to the facts herein is found in AIR 1970 SC 1906 (M. MACKENZIE V. I. M. ISSAK). While considering the case of death of a missing seaman, employed as a deck hand, where there was no direct evidence, the Apex Court held, referring to various decisions of the English Courts, that where the evidence establishes that in the course of his employment the workman was in a place proper to which some risk particular thereto is attached and an accident occurred capable of explanation solely by reference to that risk, even in the absence of evidence as to immediate cause of the accident, it is reasonable to attribute the accident to the risk associated with the place of work to view that the accident arose out of the employment. However, to quote the decision in 1931 AC 351 (SIMPSON v. L.M.& S.RLY.CO) which is extracted in the decision of the Supreme Court, the inference may be displaced "by evidence tending to show that the accident was due to some action of the workman outside the scope of employment."

20. A reference may also be made usefully to the decision reported in 1915 LR (AC) 207 (THE NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN Vs. THE SCOTTISH NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN) touching on the question of negligence. Referring to a case of an accident occurring in a level crossing, the House of Lords referred to a passage from Lord Halsbury, '"In this case. I am unable to see any evidence of how this unfortunate calamity occurred. One may surmise, and it is but surmise and not evidence that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?" And Lord Watson, with whose judgment Lord Blackburn expressed his agreement, at p. 49 said, "The evidence appears to me to show that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine or a train belonging to the respondents, and I am willing to assume, although I am by no means satisfied, that it has also been proved that they were in certain respects negligent. The evidence goes no further. It affords ample materials for conjecturing that the death may possibly have been occasioned by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned".

21. The facts of this case show that read in the context of the decision of the Apex Court referred to above, the place of occurrence of the accident, by no stretch of imagination, could be attributed to a place where there was some risk attached by reason of his employment. Having regard to the facts herein, it is clear that the accident was due to the negligence in going to a place in the sea in a dress which is unsuited for swimming. As such, the element of negligence is clearly writ large to deny the benefit of the Act.

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22. The learned counsel for the appellant further pointed out to the definition of "seaman" as well as "workman" under the Workmen's Compensation Act. Considering the definition of "workman" under the Workmen's Compensation Act, and the limited jurisdiction thereon, the status of the deceased as workman, as projected by the appellants, cannot be accepted.

23. The definition of "workman" under Section 2(n) read as follows: 'Workman' means any person who is -

(i) -

(ia) (a) a master, seaman or other members of the crew of a ship

(b)

(c)

(d)

and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or, company, as the case may be, is registered in India,

(ii) employed in any such capacity as is specified in Schedule II... Seaman is also defined under Section 2(k) of the Act as "any person forming part of the crew of any ship but does not include the master of the ship." Considering the said definitions and the fact that the deceased, a Junior Engineer IV - falling under Section 2(n) (ia) (a) as a member of the crew, his status as a 'workman' for the purpose of Workmen's Compensation Act cannot be denied. The definition is very wide to include a workman like the deceased, for the purpose of applicability of the Act. Consequently, we reject the plea of the appellant herein as to the status of the deceased as not a workman.

24. Coming to the question of applicability of an agreement of MUI-INSI, under Clause 147, it is held that it governs the terms and conditions of the foreign going Indian ships. On the question of compensation, Clause 147 assumes significance which reads as follows:-

> Payment of compensation for personal injury resulting in permanent incapacity or death arising out of and in the course of employment including death arising from heart attack but not being death or injury caused by officer's own wilful act or default or misbehavior, the Company shall pay a lumpsum compensation as under-
>
> | | |
> |---|---|
> | In the event of Death | @ 110 months' basic wages, subject to a min. of Rs.6,00,000.- |
> | In the event of permanent incapacity for sea service | @ 120 months' basic wages, subject to a min. of Rs.7,00,000/-. |

25. A reading of this shows that the compensation under the terms of the agreement would not be available if an injury or death is

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caused by officer's own wilful act or default or misbehavior. Clause 148 states that in the case of Officer found missing and presumed lost overboard and where death cannot be conclusively attributed to the officer's wilful act, default or misbehavior, compensation shall be paid as per Clause 147. As rightly submitted by the learned counsel for the appellant herein, considering the finding that the deceased officer was responsible for inviting the incident by his own negligent and wilful conduct, the question of payment of compensation as per Clause 147 does not arise. It may be noted that the question of granting compensation even as per agreement which is marked as Ex.R2, does not arise in the case, for the simple reason that the deceased invited the accident only by his own conduct, since the deceased, who was conversant with swimming into water, had gone for a swim with the boiler suit, is not totally impugned.

26. Hence, going by the findings of the enquiry report and the decision of this Court in H.C.P., considering the fact that the death did not occur in the course of or out of employment, and even though the deceased would fit in within the definitions of the "workman" under the Workmen's Compensation Act, I do not find any justification to uphold the order of the Commissioner. Consequently, the order of the Tribunal is set aside. The appeal is allowed. No costs.

bg

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

The Commissioner of Workmen's Compensation, Chennai-6.

+1 cc to Mr.S.Silambanan, Advocate Sr.No.19139.

+1 cc to Mr.P.K.Gopal Raj, Advocate Sr.No.18745.

RS(CO)
dcp/9.5.07

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